

## THE STATE OF NEW HAMPSHIRE

### SUPREME COURT

**In Case No. 2004-0885, April Tyrrell v. Concord General Mutual Insurance Company d/b/a The Concord Group, the court on August 23, 2005, issued the following order:**

The plaintiff, April Tyrrell, appeals an order granting summary judgment to the defendant, Concord General Mutual Insurance Company (Concord General). We affirm.

Christine Richards owned a Pontiac Sunbird, and was insured by Concord General. Her son, Matthew Lamb, was an authorized user of the vehicle. On March 1, 2003, while Richards was out of state, Matthew's friend, Dwayne Kent, drove the Sunbird and was involved in a motor vehicle accident in which the plaintiff was injured. Kent's driver's license had been revoked prior to March 1, after he had been adjudged a habitual offender. Both Richards and Lamb knew that Kent did not have a driver's license.

The plaintiff sought a declaratory judgment that Concord Mutual is required to defend and indemnify Kent. Concord Mutual moved for summary judgment, relying upon an exclusion in the policy for one "using a vehicle without a reasonable belief that that 'insured' is entitled to do so." The plaintiff now appeals the grant of summary judgment to Concord Mutual.

The plaintiff acknowledges that we recently construed the same exclusion in another case, and concluded that a person could not as a matter of law have a reasonable belief that he was entitled to drive a car when he knew he did not have a valid driver's license. Progressive N. Ins. Co. v. Concord Gen. Mut. Ins. Co., 151 N.H. 649, 651 (2005). The plaintiff argues, however, that we should adopt an exception to this general rule. She contends that there is evidence that would support a competing harms defense under RSA 627:3 for Kent's conduct, and that an exception should be created for such exigent circumstances. She notes that in his deposition, Kent alleged that he was the only person among a group of friends at Lamb's house who had not been drinking beer. When Lamb was getting ready to drive to the store, Kent alleges that he told Lamb not to leave and that he would go. Lamb said, "Okay, go," and told Kent where the car keys were. Kent took the keys, and drove to the store. As he was returning, he was involved in the accident that injured the plaintiff.

We agree with Concord Mutual that viewed in the light most favorable to the plaintiff, the evidence does not support a competing harms defense as a matter of law. We need note only that one requirement for such a defense is that there be no reasonable, lawful alternative to the illegal conduct. State v. L'Heureux, 150 N.H. 822, 827 (2004). Here, Kent obtained the keys to the car.

Thus, he plainly had reasonable lawful alternative means of preventing Lamb from driving to the store while intoxicated, and no reasonable person could find otherwise. Cf. State v. O'Brien, 132 N.H. 587, 590 (1989) (court may dispose of competing harms defense as a question of law). Accordingly, we need not decide today whether to adopt a competing harms exception to the general rule we articulated in Progressive Northern.

The plaintiff next argues that Concord General is required to provide at least the minimum statutory insurance coverage required under the Financial Responsibility Act. See RSA 264:18, VI. The material fact here at issue is whether Kent obtained possession or control of the Sunbird with the express or implied consent of Richards. The plaintiff relies upon Kent's statement that Lamb gave him permission to take the car. See, e.g., Gov't Empl. Ins. Co. v. Johnson, 118 N.H. 899, 902 (1978). Here, however, Kent admitted in his deposition that he knew the car belonged to Richards, and that he also knew that if he had asked her for permission to drive the car, she would not have given him permission because he did not have a license. Therefore, it does not matter whether Lamb gave Kent permission to drive – Kent admitted knowing that Richards, who owned the car, would not have given him permission. Under these circumstances, Kent could not have believed that he had obtained express or implied permission of Richards to drive her vehicle regardless of Lamb's actions.

The plaintiff responds to this argument by noting that Kent also stated in his deposition that while he did not think Richards would give him permission to drive under normal circumstances, he was "sure she probably would have wanted [him] to drive it if she would have known that somebody that was drunk was about to take it to the store." Thus, the plaintiff argues that a dispute of fact exists as to whether Kent believed he had Richards' implied consent to drive.

While we have stated that implied permission is considered from the perspective of the subsequent permittee (in this case, Kent), we have also indicated that the subsequent permittee's belief must be both actual and reasonable. See Progressive Northern, 151 N.H. at 660. Kent's own statement indicated that he believed Richards would have wanted him to drive if she knew that someone who was drunk was about to drive the car to the store. This belief presupposes that there was no reasonable, lawful alternative other than Kent driving the car that would have prevented an intoxicated person from driving. For the reasons set forth above, we have already rejected this presupposition. Thus, we conclude that Kent could not have reasonably believed that Richards would have permitted him to drive the Sunbird.

Affirmed.

NADEAU, DALIANIS and GALWAY, JJ., concurred.

**Eileen Fox**  
**Clerk**